No. 91-538

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

FORSYTH COUNTY, GEORGIA,
Petitioner,

v.

THE NATIONALIST MOVEMENT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

MARSHA S. BERZON
177 Post Street, Suite 300
San Francisco, CA 94108

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

Page

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-538

FORSYTH COUNTY, GEORGIA,
Petitioner,

v.

THE NATIONALIST MOVEMENT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international unions with a total membership of approximately 14,000,000 working men and women, is filed with the consent of the parties and in support of the respondent, as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Last week, President Bush visited San Francisco for two hours in order to attend a re-election fund-raising event at the St. Francis Hotel. A few days afterward, a member of the San Francisco Board of Supervisors who is also president of the local Central Democratic Committee "ask[ed] the Board . . . to draft a letter requesting a check from President Bush and the Republican Party in the amount of $20,000—what it cost The City in police overtime during Bush's two-hour visit." "Migden: No free lunch for Bush—Who will pay S.F. cops' overtime?" *San Francisco Examiner*, February 29, 1992, p. A1, col. 1; *see also* "SF Billing Bush $20,000 for Police Overtime", *San Francisco Chronicle*, March 3, 1992, p. A13. The response of the vice chairman of the San Francisco Republican Committee was that "'If [the Board] wants to present the federal government with a bill for $20,000, then we'd like to do the same for several nonprofits who have taken up police time with protests.'" *Id.*[1]

As the San Francisco Supervisor quoted above recognized, *any* activity of public interest—including speeches and other political events—that takes place on private property generates crowds and traffic problems on the adjacent public streets and public gathering places. The costs of controlling those crowds and that traffic, providing necessary security and attending to the other consequences of such events are treated as ordinary governmental costs, payable by the local taxpayers as a whole.

[1] It bears noting that in fact, the request was not that the federal government bear the cost, but that President Bush or his political party bear it, because the visit was not governmental but a private, campaign event. *See id.* ("This is different than a state visit, [the Supervisor] continued . . . . [T]his was a fundraising trip and the people of San Francisco should not be expected to pay for his expenses.") Yet, President Bush's campaign speech, and appeal for funds as part of that speech, were indubitably protected First Amendment activity. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976).

See id. ("'We are obligated to provide security when Bush visits, so this is a request, not a demand.'")

Cities do not ordinarily charge commuters for rush hour traffic control or downtown merchants for the additional police necessary to maintain order during the pre-Christmas shopping rush, or football teams or opera companies for the added load on public facilities caused by their games and performances. Nor, so far as we are aware, are there any reported cases concerning situations in which localities have attempted to condition events, including First Amendment protected activity, on *private* property upon payment of licensing fees designed to defer the cost of such traditional governmental activities as street cleaning, traffic control, and police security. The ordinance here in question, for example, applies only when the communicative activity itself takes place on public property. Pet. App. 103, 112, 117.

At the same time, the primary rationale offered by Forsyth County in this case for its "user fee" ordinance is identical to the one cited by both the San Francisco Supervisor and the Republican Party official quoted above. *See* Brief for Petitioner at 26 ("those wishing to express themselves have a responsibility to share the expense, within reasonable limits, as long as that fee is directly related to the costs which they cause government to incur.")

The San Francisco dispute, then, demonstrates that the governmental interests that purportedly justify shifting the cost of traditional governmental services for expenses due to activity protected by the First Amendment are *not* conceptually limited to the situation, presented here, in which the First Amendment activity takes place upon public property. We therefore begin analysis of the applicable constitutional principles without regard to the public property aspects of this case. After that, we consider whether there is anything in the fact that the speeches and rally in this case took place on the court-

house steps that justifies a greater permission to charge the speakers for "maintenance of the public order in the matter licensed" than would otherwise obtain. Stated in greater detail, we proceed as follows:

1. Recent cases of this Court establish four interrelated principles governing the authority of government to require the payment of fees in connection with the exercise of First Amendment rights. First, financial burdens upon speakers based upon the content of their speech are impermissible, whether or not the government's motive is to suppress the speech. Second, a discriminatory tax on communicative activity particularly, or on some communications but not others of the same type, impermissibly burdens First Amendment rights. Third, any charge of a flat license fee as a precondition to conducting First Amendment activity is an invalid prior restraint upon speech. Finally, government *may* impose generally applicable, after-the-fact, nondiscriminatory taxes upon sales made or income received in connection with First Amendment activity. Pp. 6-10 *infra*.

2. Petitioner maintains that a license fee covering the governmental costs directly generated by communicative activity is similar to a generally applicable sales or income tax on First Amendment-related activity, and therefore valid. Such user fees, however, are, in fact, similar to the kinds of fees this Court has invalidated as impermissible in the First Amendment context.

For example, the financial burden on speakers of license fees based upon governmental costs is likely to vary with the content of the speech, since the "maintenance of public order" will be more costly when the speaker is controversial. Charging speakers for the costs of maintaining public order when they speak also has vices similar to those inherent in discriminatory taxation of communication, because traffic control and security costs on public property are ordinarily absorbed by the taxpayers generally, not by the individuals whose activities

generate the expenditures. And requiring the payment of a user fee as a precondition to the exercise of First Amendment rights also entails dangers similar to those created by flat license taxes. Both operate as a prior restraint and, because not paid through income generated by the communicative activity itself, neither bears any relationship to the economic benefits of engaging in the activity. For all these reasons, user fees based upon the cost of assuring public safety tend to restrict the breadth of discussion on public issues and are inconsistent with the goals of the First Amendment. Pp. 10-15 *infra*.

3. This conclusion does not vary where, as here, the communicative activity itself takes place on public property. Areas such as those covered by the Forsyth ordinance are traditional public fora, in which the government's authority to restrict expressive conduct is at its most limited. In such areas, this Court's cases establish that communicative uses are constitutionally *at least coequal* with other uses, and are not simply tolerated as a matter of governmental grace. Consequently, restraints upon speech in public fora, such as placing economic burdens on the right to speak, are subject to the same strict standards applicable to censorship of speech generally. Pp. 15-19 *infra*.

4. In arguing to the contrary, petitioner relies almost exclusively on *Cox v. New Hampshire*, 312 U.S. 569 (1941). *Cox*, in a single paragraph, upheld a licensing fee, for parades and processions *only*, of up to $300 a day, based upon the cost of administering the licensing scheme and of "maintenance of public order" in each particular instance. *Cox*, however, was decided before the formulation of any of the general principles concerning government imposition of economic burdens upon speech outlined above, before this Court's public forum doctrine developed in its present form, and before the cases proscribing restriction of speech on the basis of the hostile reaction of the listeners were decided. All these develop-

ments point to the conclusion that the user fee holding of *Cox* is out of step with contemporary First Amendment jurisprudence and is therefore no longer good law.

Alternatively, the license fee aspect of *Cox* should be read narrowly, in light of the actual facts of *Cox* and the interpretation of that opinion two years later in *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 113-14 (1943). Under this approach, imposition of cost-related license fees for First Amendment activities would be permissible only if the ordinance as drafted or interpreted (a) makes clear that the fee can be charged solely for speech activity that entails *exclusive* use of a location, and then only with respect to the costs incurred in excluding other, competing uses; and (b) imposes a fee "nominal" either in the absolute sense of that word or in the sense that it is a minor percentage of both the applicant's resources and the government's actual expenditures. Because the Forsyth County ordinance violates both these requirements, it is substantially overbroad and therefore invalid. Pp. 19-25 *infra*.

ARGUMENT

1. This is the first time in the fifty years since the decision in *Cox v. New Hampshire*, 312 U.S. 569 (1941),[2] that this Court has been asked to focus directly upon the precise question of whether, and, if so under what circumstances, persons engaged in communicative activity, protected by the First Amendment, must bear such direct costs to the locality as police protection, cleanup, and traffic diversion as a precondition to permission to engage in the activity.[3] The larger question posed by the required

[2] As we explain below, *Cox* does not directly control this case, because of differences of substance between the First Amendment activity involved in that case and in this one, and because developments in First Amendment jurisprudence subsequent to *Cox* raise considerations the *Cox* Court had no basis to address, and therefore did not consider. *See* pp. 19-25, *infra*.

[3] We do not understand there to be any dispute in this case concerning whether or not the speeches and rally respondents

payment of fees of one kind or another as a condition of the exercise of First Amendment rights is, however, one this Court has often addressed during this period. That jurisprudence thus provides an appropriate starting place for considering the particular problem posed here.

Four distinct but interrelated general principles emerge from the recent cases that bear upon conditioning the exercise of free speech rights upon the payment of fees to the government:

First, "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster v. New York Crime Victims Bd.*, —— U.S. ——, 112 S. Ct. 501 (1992); *see also Leathers v. Medlock*, —— U.S. ——, 111 S. Ct. 1438, 1444 (1991); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987). As this Court has explained, the basis for that notion is "a far broader principle" (*Simon & Schuster*, 112 S. Ct. at 508):

> "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) . . . . [T]he Government's ability to impose content-based burdens on speech raises the specter that the Government may effectively dry up certain ideas or viewpoints from the marketplace . . . As we reiterated in *Leathers*, "The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, put-

wished to hold on the Forsyth County courthouse steps are fully protected First Amendment activities. Indeed, whatever one thinks of the message respondents wished to convey, the projected demonstration is one at the center of the First Amendment's protections, involving an attempt to protest a governmental enactment through, for aught that appears, peaceful speeches and a rally, in front of a government building. 913 F.2d 885, 887. *See United States v. Grace*, 461 U.S. 171, 179 (1983); Pet. Br. at 23.

> ting the decision as to what views shall be voiced largely into the hands of each of us." [*Simon & Schuster*, 112 S. Ct. at 508.]

It bears emphasis that to fulfill its speech-enhancing purpose, the proscription upon content-based financial regulation focuses on the content-discriminatory *effect* of the regulation, not on the governmental motive underlying the regulation. *Id.* at 509 (it is "incorrect" that "discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas"); *see also Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983).

Second, this Court's "cases clearly establish that a discriminatory tax on the [communicative activity at issue], burdens rights protected by the First Amendment." *Arkansas Writers' Project*, 481 U.S. at 227. A tax that *either* singles out speech-related activity for special treatment *or* "targets a small group of speakers" is discriminatory in this sense. *Leathers*, 111 S. Ct. at 1444-45; *see also Minneapolis Star*, 460 U.S. at 585, 592-93; *Arkansas Writers Project*, 481 U.S. at 229. These prohibitions upon "differential taxation of First Amendment speakers" (*Leathers*, 111 S. Ct. at 1443) are largely prophylactic: Even when the tax is not facially content-discriminatory and no illicit intent can be shown, "a tax limited to [First Amendment-protected activity] raises concerns about censorship of critical information and opinion", as does a tax upon some but not all speakers. *Leathers*, 111 S. Ct. at 1444; *see also Minneapolis Star*, 460 U.S. at 575, 585.

Third, any flat fee charged, whether discriminatory or not, as a condition of obtaining a permit for conducting First Amendment activity, "unrelated to the receipts or income of the speaker or to the expenses of administering a valid regulatory scheme" constitutes an unconstitutional tax on free expression, and an invalid prior restraint

upon speech. *Minneapolis Star*, 460 U.S. at 586 n. 9 & cases cited; *Swaggart Ministries v. Cal. Bd. of Equalization*, 493 U.S. 378, 385-90 (1990). As this Court has explained,

> Freedom of speech, freedom of the press, freedom of religion, are available to all, not merely to those who can pay their own way. . . . A state may not impose a charge for the enjoyment of a right granted by the federal constitution . . . The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court repeatedly has struck down . . . . On their face [such taxes] are a restriction of the free exercise of those freedoms which are protected by the First Amendment. [*Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 113-14 (1943).]

See also Follett v. Town of McCormick, 321 U.S. 573, 577-78 (1944).

Finally, all of these strands of authority limiting governmental power to impose financial burdens upon the exercise of First Amendment freedoms recognize that there are circumstances in which individuals and organizations are *not* exempt from governmentally-imposed economic burdens in some way connected to the exercise of First Amendment rights. Rather, generally applicable, after-the-fact, nondiscriminatory taxes upon sales or income ordinarily *can* be applied to the proceeds of First Amendment activity. *Murdock*, 319 U.S. at 112; *Follett*, 321 U.S. at 577-78; *Minneapolis Star*, 460 U.S. at 586 n.9; *Arkansas Writers' Project*, 481 U.S. at 229; *Swaggart Ministries*, 493 U.S. at 389.

Such taxes, the Court has emphasized, are unlikely to "threaten[] to suppress the expression of particular ideas or viewpoints" (*Leathers v. Medlock*, 111 S.Ct. at 1443) overtly *or* covertly, since "a government will [not] destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency," (*Minneapolis Star*, 460 U.S. at 585; *see*

also Arkansas Writers' Project, 481 U.S. at 228). And sales, use, or income taxes "do not act as prior restraints —no fee is charged for registering, the tax is due regardless of preregistration, and the tax is not imposed as a precondition of disseminating the message." *Swaggart Ministries*, 493 U.S. at 390. Moreover, since such taxes are due only if, and to the extent that, direct economic benefits are derived from the exercise of First Amendment rights, and are related to the amount of that benefit, it is unlikely that the resulting financial obligation will inhibit the prospective speaker from exercising his free speech rights. *Id.* at 389; *see also id.* at 391 (indicating that there could be constitutional problems with generally applicable tax rate high enough to "effectively choke off" the exercise of First Amendment rights).

2. Petitioner's contention is, in essence, that while a flat fee or tax as a precondition to obtaining a license to engage in First Amendment-protected activity is invalid as a prior restraint upon speech, a fee related to the governmental costs directly attributable to a demonstration is similar to a generally applicable, after-the-fact, nondiscriminatory sales or income tax and is, on that basis, valid. Petitioner's *amici curiae*, and some courts, take the position that as long as the nexus between the advance fee charged and the costs actually incurred by the locality can be substantiated and the guidelines for imposition of the tax are sufficiently clear, there is no limit at all to the amount of a "user fee" that may constitutionally be charged as a condition of carrying out activity protected by the First Amendment. *See, e.g.*, Brief of the City of Orlando as Amicus Curiae Supporting Petitioner ("Orlando Br.") at 8-9; *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1136 (6th Cir. 1991).

The proffered analogy between a "user fee" ordinance of the kind in this case and a nondiscriminatory sales or income tax upon the economic proceeds of speech-related activity simply does not hold. On analysis, such a permit

fee is analogous to the types of fees that this Court has ruled are constitutionally *invalid*.

(a) First, a permit fee measured by "the expense incident to the administration of the Ordinance and to the maintenance of public order" (Pet. App. at 119) can well "impose[] a financial burden on speakers because of the content of their speech." *Simon & Schuster*, 112 S.Ct. at 501.

As the facts of this, and other of the reported, cases indicate, the costs of "maintenance of public order" can easily turn upon the views of the speaker:

> Although the presence of out-of-town demonstrators and the potential for hostile counter activity are proper factors to be considered in determining what level of police protection is needed for a public demonstration, . . . such factors cannot be considered in fixing the cost of protection to those asking to exercise their First Amendment rights. Otherwise, the result would operate to charge more for speech which is unpopular or controversial, in the mind of a public official. This does not comport with the First Amendment principle of equality of expression under the Constitution. [*Cent. Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1525 (11th Cir. 1985).]

See also, e.g., Pet. Br. 3, 6 (civil rights marches in Forsyth County met by hundreds of violent counter-demonstrators, costing the government several hundred thousand dollars to control); *Gregory v. City of Chicago*, 394 U.S. 111, 117 (1969) (hostile reaction to civil rights march); *Edwards v. South Carolina*, 372 U.S. 229, 236 (1963) (same).[4]

---

[4] These "heckler's veto" costs can be incurred even where the speech activity itself takes place on private property. Speeches by controversial figures at conventions or other private events often

A government-imposed fee as a precondition to speaking that increases as the content of the proposed speech becomes more controversial thus contravenes the basic principle underlying the proscription on content-based economic burdens on speech: "to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us." *Simon & Schuster*, 112 S. Ct. at 508. Such fees thus "lead to a standardization of ideas either by legislatures, courts, or dominant political or community groups." *Terminiello*, 337 U.S. at 4-5.[5]

---

provoke demonstrations around the building where the event is taking place.

For example, in *Terminiello v. Chicago*, 337 U.S. 1 (1949), an individual was convicted of disorderly conduct because of a speech delivered inside an auditorium:

> The meeting commanded considerable public attention. The auditorium was filled to capacity with over eight thousand persons present. . . . Outside of the auditorium a crowd of about one thousand persons gathered to protest against the meeting. A cordon of policemen was assigned to the meeting to maintain order; but they were not able to prevent several disturbances. The crowd outside was angry and turbulent. [*Id.* at 3.]

Similarly, at least part of the cost incurred by San Francisco for the President's two hour visit involved controlling demonstrators protesting the President's policies. "Bush Warns About Demo Defense Cuts: 15 Arrested as President Visits SF," *San Francisco Chronicle*, February 26, 1992, at A1.

Conversely, unusually popular views can also lead to increased need for security and traffic control, because of the sheer size of the crowd attracted. Again, these expenses can be incurred whether the event itself takes place on private or public property.

[5] The Forsyth County ordinance does not simply fail to exclude control of hostile onlookers from the "maintenance of public order" expenses charged to speakers and demonstrators, but explicitly contemplates that such costs *can* be charged. Pet. App. 100 ("the cost of necessary and reasonable protection of persons . . . observing said activities exceeds the usual and normal cost of law enforcement for which those participating should be held accountable and responsible.")

(b) Charging speakers for the costs of maintaining order while they speak is also similar to imposing a differential tax upon First Amendment-protected activity. Normally, no fees are charged for using public streets, parks and squares, and the costs of providing police protection, sanitation, and traffic control are spread over the populace at large through general taxation.[6] Neither merchants nor customers directly bear the cost of putting traffic police on downtown streetcorners, or of cleaning the litter from the streets after a day in which crowds throng to downtown stores. Imposing such costs on President Bush, for example, because his speech activities occasioned unusual traffic problems would be tantamount to a differential fee structure for protected activity alone, unconstitutional under the rule of *Minneapolis Star*, *supra*. Thus, any user fee statute that singles out speech activity for charges is presumptively invalid as equivalent to discriminatory taxation of communication.

Moreover, even those "user fee" ordinances that do not facially single out First Amendment protected activity specifically, but instead apply generally to organized groups seeking to use public locations for events, may still run afoul of the concerns underlying *Minneapolis Star* and related cases.

In the first place, in some instances it will be quite plain, as it is in this case, that the ordinance setting per-

---

[6] *See City of Flagstaff v. Atchison, Topeka & Santa Fe*, 719 F.2d 322, 323 (9th Cir. 1983) (common law rule is that cost of police, fire and other emergency service is borne by the public as a whole); *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077 (D.C. Cir. 1984)

Where entry fees *are* charged for use of public facilities—as for some bridges, toll roads, certain public parks and monuments, and public arenas—there *is* a useful analogy to generally applicable, nondiscriminatory taxation. We would suppose that individuals engaging in First Amendment activity would *not* be exempt from paying such generally applicable user fees for use of such public places.

mit fees was occasioned by concern over political demonstrations and was intended primarily to apply to such demonstrations. Pet. Br. at 2-3, 6 (ordinance passed after two civil rights demonstrations in 1987, "[a]s a direct result of the cost incurred in [t]hose two demonstrations.") A fee ordinance actually motivated by a desire to affect protected activity is plainly discriminatory and invalid. *See Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

Secondly, even a "user fee" ordinance that is facially neutral may well be discriminatory in effect as applied to communicative activity. Typically such ordinances allocate the *entire* cost of keeping the peace and maintaining sanitary conditions to the speaker. Yet, onlookers, passersby, and users of the same area are also protected from disorder and litter through the very same expenditures. Charging user fees to some but not all of the beneficiaries of the very same public expenditures, when the feepayers are those engaging in protected activity, economically *overcharges* speakers, and is in that sense discriminatory. Just as *Minneapolis Star* states a prophylactic rule against differential taxation to assure against subtle restriction of speech, a similar prophylactic approach should bar such overcharges as applied to First Amendment activities, permitting user fees only if *all* persons using a particular location are required to pay the fee.

(c) User fees imposed as a precondition to engaging in First Amendment activities also share many of the characteristics of flat license taxes imposed as a precondition to engaging in expressive activity.

Clearly, the *effect* of the user fee in this case is identical to that of the license fees in *Murdock* and *Follett*: In both those cases and in this one, the communicative activity could not (and, in the circumstances giving rise to this case, in fact did not) go forward unless and until the fee is paid. The user fee requirement therefore operates as a prior restraint upon speech for those individuals and groups, like respondent here, who cannot afford the fee.[7]

Moreover, the amount of a user fee—unlike a sales, use, or income tax—is not related to any *economic* benefit an individual or group derives from communicative activity.[8] Thus, there is no reason to expect that the activity itself will generate the funds from which to pay the exacted fees, thereby avoiding any inhibition on speech. Indeed, since the amount of a user fee is potentially open-ended (unless, as in this case, a cap on the fee is included in the regulatory scheme), the potential for censorial impact upon a broad range of potential speakers, including even relatively affluent ones, is much greater than that of the typical flat license fee. *See* Pet. Br. at 6 (police costs for one civil rights march in Forsyth County were $700,000).

3. The question then becomes whether the conclusion that user fees on First Amendment activity are invalid obtains where the user fee permit requirement applies only to communicative activity that takes place on public property.

The ordinance here at issue requires a permit, and a permit fee of up to $1,000 per day, whenever more than

---

[7] Again, in this case the analogy is particularly clear: The permit required in this case is *in terms* "for the *privilege* of engaging in such activity [a parade, assembly, demonstration, road closing, or other activity]". Pet. App. 103. The core of *Murdock, however*, as this Court's recent cases emphasize, is that "a person cannot be compelled 'to purchase, through a license fee or a license tax, a privilege freely granted by the constitution." 319 U.S. at 114; *see also Swaggart Ministries*, 493 U.S. at 386.

[8] A "use tax" is not simply another term for a "user fee". Rather, while a user fee attempts to charge the user of a service for some approximation of the expenses of delivering that service, a use tax is a general revenue-raising device that serves as an alternative to a sales tax and is thus calibrated to the value of some property that an individual uses.

three people hold a "parade, assembly, demonstration, road closing, or other activity" on "public property *or* public roads." Pet. App. at 103 (emphasis supplied).[9]

We take it to be common ground that the locations covered by the ordinance generally, and the location of the demonstration planned in this case in particular—the open grounds of the County Courthouse—are indubitably "among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without any further inquiry, to be public forum property." *United States v. Grace*, 461 U.S. 171, 179 (1983); *see* Pet. Br. at 28.

As a general matter, "in such places, the government's ability to permissibly restrict expressive conduct is very limited." *Id.* at 177. Specifically, time, place and manner regulations are permitted where the regulations are "content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).[10]

---

[9] This case as it comes to this Court does *not* involve a permit to parade on public streets, interfering with vehicular or pedestrian traffic, but a permit to "conduct a rally and speeches for one and a half hours" on the courthouse steps on a weekend afternoon. *Nationalist Movement v. City of Cumming*, 913 F.2d 885, 887 (11th Cir. 1990). Although there was also to be a march to the courthouse, the parade route was along city, not county, streets, and the City of Cumming imposed no licensing fee. *See id.* at 887-90.

[10] Petitioner attempts to characterize licensing fee requirements as a "time, place, and manner" restriction, subject to a lesser standard of scrutiny than an absolute prohibition upon speech in a traditional public forum. Pet. Br. at 29. This attempt fails for three reasons.

First, imposition of a *prior* license fee cannot be seen as a limitation only upon a "manner" of a demonstration or rally. Such

"Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *United States v. Grace*, 461 U.S. at 177; *see also Boos v. Barry*, 485 U.S. 312, 381 (1988); *Frisby v. Schultz*, 487 U.S. 474, 479 (1988).

The stringent standards the Court has established for restrictions on speech in traditional public fora rest on the understanding that the vitality of the First Amendment requires that there be *some* places available to each member of the public at large for the purpose of com-

---

a *prior* fee, based upon estimates by governmental personnel as to how the event is *likely* to be conducted, can preclude an event entirely, even if the event as actually conducted does not generate the costs feared. Moreover, real "manner" restrictions, such as requirements for marshals provided by the demonstrators, or prohibitions upon dangerous activities, can accomplish many of the cost- reduction goals of "user fee" ordinances without the prior-restraint aspects of the user fee approach. Such restrictions, additionally, do not create the unequal access to a constitutional right based upon economic resources inherent in user fee schemes, particularly ones with open-ended fee amounts.

Second, the general question in this case is the propriety of, and the limitations upon, license fees for First Amendment use of public property generally. If such fees are generally permissible, there is no reason to expect that the fees will not be generally imposed, leaving no free areas open for the exercise of First Amendment rights. Put another way, licensing fees of the kind here at issue are at least *no better* than total exclusions from the area covered for purposes of determining the application of "time, place, and manner" principles. Whether, under these particular circumstances or any other, such a total exclusion would be valid is not the question upon which *certiorari* was granted.

Third, user fees are in fact a *less* appropriate subject for the "time, place, and manner" standard than blanket exclusions from the relevant area. As noted, the lesser "time, place and manner" standard of scrutiny applies only when there is no content-based discrimination. The calculation of costs attributable to communicative activity on public property, however, is inherently content-based in a way that flat exclusions from limited physical areas are not.

municating with his/her fellow citizens on issues of public importance. "The very idea of a government, republican in form, implies a right of its citizens to meet peaceably for consultation in respect to public affairs and to petition for redress of grievances." *Hague v. CIO*, 307 U.S. 496, 513 (1939) (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).

Such locations have thus "immemorially been held in trust for the use of the public." 307 U.S. at 515. Because that use has "time out of mind" included "assembly, communicating thoughts between citizens, and discussing public questions," in those places, at least, "communication of views on national questions" is a constitutional "privilege of a citizen of the United States" and "must not, in the guise of regulation, be abridged or denied." *Id.* at 516; *see also Boos*, 485 U.S. at 321; *Frisby*, 487 U.S. at 479; *Grace*, 461 U.S. at 180.[11]

This Court's traditional public forum cases, then, teach that the use of streets, parks and similar public places for communication purposes is, *as a matter of constitutional right*, a normal and *at least coequal* use of such areas, not a privilege to be bought or earned. Such communicative uses of these traditional public fora maintain the vitality of the exchange of ideas in a democracy and are, thus, *not* purely private uses, but for the benefit of us all.

"User fee" statutes and ordinances such as the one here at issue proceed from a precisely contrary assumption—that "expressive conduct . . . is outside of—and on a lesser footing than—the 'basic mission' of [traditional public fora]." *A Quaker Action Group v. Morton*, 516 F.2d 717, 725 (D.C. Cir. 1975). The explicit language of the For-

[11] *See generally* Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in Support of Petitioners in *International Society for Krishna Consciousness v. Lee*, Nos. 91-155 and 91-889, at 8-12 (surveying the origins and purposes of the traditional public forum doctrine).

syth County ordinance makes this plain: that ordinance regards all parades, assemblies, and demonstrations by "private organizations and groups of private persons" as "private purposes". And the ordinance in terms regards "the costs of necessary and reasonable protection of persons participating in or observing . . . parades, assemblies [and] demonstrations" as costs that "exceed[] the usual and *normal* cost of law enforcement." Pet. App. at 100 (emphasis supplied).

Thus, "user fee" public forum ordinances are at odds with the basic principles developed not only in this Court's recent cases concerning economic burdens upon the exercise of First Amendment rights but in the traditional public forum cases as well. Simply stated, under both these lines of authority, licensing fees on communicative activity on public property designed to reimburse municipalities for police, traffic, and sanitation costs entail too great a danger of contracting the breadth of debate among citizens about controversial public issues to pass constitutional muster.

4. (a) In arguing to the contrary, petitioner relies almost entirely upon *Cox v. New Hampshire*, *supra*. And *Cox* does leave at least some room for a license fee, based upon the costs both of administering the licensing scheme itself and of "maintenance of public order in the matter licensed", as a precondition to expressive activity in what is now called a traditional public forum. *Id.* at 577.

Cox, however, was decided during the infancy of the relevant First American doctrine. And the single paragraph in *Cox* addressed to the user fee question does not consider *any* of the dangers to the system of freedom of expression that such fees clearly entail and that this Court's later First Amendment decisions guard against.

For example, *Cox* was decided before *Terminiello*, *supra*, the first in a long line of cases holding that speakers can-

not ordinarily be held responsible for, or censored because of, the audience's reaction to their speech. Moreover, *Cox* was also decided long before *Minneapolis Star*, *supra*, for the first time elucidated the dangers to the development of varying viewpoints posed by differential governmental fees for speech activity even where there is no motive to censor, and developed a prophylactic rule to avoid those dangers. Finally, *Cox* was decided before *Murdock*, *supra*, considered in detail the prior restraint aspects of licensing fees as a precondition for speech activity.

Thus, a strong argument can be made that *Cox's* brief discussion of the constitutionality of user fees has been eroded by time and by the developing First Amendment law. The essence of that argument is laid out at pp. 6-15 of this brief, so we do not repeat it here. At the least, for the reasons we develop below, that part of *Cox* should be read strictly and narrowly, and later clarifications of the First Amendment's scope and meaning should be given full effect.

(b) It bears noting, first, that the *only* question relating to user fees decided in *Cox* concerned a fee for a license to "engag[e] in a 'parade or procession' upon a public street," *viz*, at 571. Moreover, "the regulation with respect to parades and processions was applicable only to organized formations of persons using the highways" (*id.* at 575)—to a "march in formation" (*id.* at 574)—and "[t]he marchers interfered with the normal sidewalk travel" (*id.* at 573). The *Cox* Court took pains to emphasize that the marchers "were not prosecuted for distributing leaflets, or for conveying information by placards or otherwise, or for issuing invitations to a public meeting or for holding a public meeting", and that therefore "the question of the validity of a statute addressed to any other sort of conduct than that complained of is not before us." *Id.* at 578.[12]

[12] Some years later, the applicability of an identical provision to a public open-air meeting did come before this Court in *Poulos v. New Hampshire*, 345 U.S. 395 (1953). *Poulos* recognized that the *Cox* opinion upheld the licensing ordinance *only* with regard to a parade or procession, and treated the question of its validity as applied to a meeting *de novo*. 345 U.S. at 400; *see also id.* at 421 (Black, J., dissenting). And while *Poulos* upheld the licensing scheme generally as applied to public meetings, there is no indication in *Poulos* that any user fee was charged as a condition of the license, and no discussion of any fee issue whatever.

Parades on public thoroughfares such as the one giving rise to *Cox* are different from most other uses of traditional public fora for speech purposes because parades often involve the *exclusive* use of public thoroughfares, interfering directly with other, equally legitimate uses. In contrast, the kinds of costs entailed simply because crowds may gather to hear a speaker are no different from ordinary traffic control costs—assuming, as we must, given the developed public forum doctrine, that speakers and shoppers are equally entitled to use of the street. Similarly, protection from hostility or from violent attacks while using the streets for valid purposes is a "normal" cost of keeping the streets open for the citizenry generally, and cannot be fairly characterized as a cost associated only with speakers in particlular.

The user fee discussion in *Cox*, if still good law, should thus be read as sanctioning fees for "maintenance of public order" as a precondition to licenses *only* where the communicative activity involves *exclusive* use of a public location for parading or demonstrating, and then *only* with regard to costs incurred because of the need, if any, to provide alternative facilities for the others who wish to use that location as well.[13]

[13] Any such judgment regarding claims of exclusive use would have to be carefully made, with particular regard to the actual circumstances.

The demonstration in this case, for example, was to take place on the courthouse grounds on a Saturday afternoon. It is questionable, therefore, whether there were any significant competing users to disturb at that time, since the court was presumably not open. Moreover, demonstration activity on courthouse steps does not

Indeed, because under the traditional public forum doctrine the use of streets, parks and other similar public places for expressive activity is *not* subordinate to other uses, there is no basis for allocating to the speakers the *full* cost of accommodating competing users of the same space. At most, only a *pro rata* share of the cost can properly be allocated to the organization seeking to demonstrate or parade, with the remainder borne by the tax payers at large.[14]

(c) *Cox's* discussion of user fees also must be read, if it is to be preserved at all, as placing strict limits upon the amount of the fee that can be charged as a precondition to communicative activity in traditional public fora.

The statute at issue in *Cox* permitted fees only up to $300 per day. Thus, *Cox* clearly does not sanction, and this Court's later cases would not permit, an open-ended user fee statute such that approved by the Sixth Circuit in *Stonewall Union* and argued for by *amici curiae* City of Orlando, et al. here. *See* p. 10, *supra*.

Murdock, *supra*, decided two years after *Cox*, clarified the holding in the earlier case with regard to the amount of the fee that could be charged: The later opinion

---

necessarily interfere with those attempting to using the steps for ingress and egress. A evidenced by the press conferences that take place daily on the steps of this Court, more than three people grouped together for speech purposes can certainly be accommodated before there is any interference with entry to the building or with its internal use.

[14] This cost-allocation problem indicates, once again, why the better approach would be to conclude that the user fee aspect of *Cox* is no longer good law at all. Once it is recognized that speakers and nonspeakers are co-equal potential users of an area, it is difficult to justify charging one group directly for the costs of exclusive use, while spreading the costs of accommodating the competing users over the taxpayers as a whole. More logically, either both groups should be charged a user fee, or both should be accommodated through tax-financed expenditures.

distinguished the earlier one, *twice*, as permitting only a "nominal [fee], imposed as a regulatory measure. . . ." 319 U.S. at 116; *see also id.* at 113-14 (again referring to the tax in question as "not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question."). *Murdock* explained this dual reference to "nominal" fees, briefly, by referring to a line of cases under the interstate commerce clause permitting "a fee to defray the cost of purely local regulations . . . 'so long as they do not impede the free flow of commerce. . . .'" *Id.* at 114 n.8, citing, *inter alia*, *Clyde-Mallory Lines v. Alabama*, 296 U.S. 261 (1935).

The *Clyde-Mallory* analogy is useful in elucidating what the *Murdock* Court had in mind by the locution "nominal fee imposed as a regulatory measure," for two reasons.

First, the fee charged in *Clyde-Mallory* was analogous to the bridge and road tolls and park admission fees we referred to above (at p. 13): *Everyone* using the locality in question paid a fee, not just a subgroup of users; by spreading the costs over *all* users, the fee could indeed be kept "nominal." Second, *Clyde-Mallory* made clear that a fee that *in fact* impeded interstate commerce would *not* be constitutional. 296 U.S. at 267. Again, since engaging in speech, unlike operating boats, is not essentially economic activity, the likelihood that charging a fee will *in fact* operate to discourage protected activity is immeasurably greater. That is why, presumably, *Murdock* stated, *twice*, that only a "nominal" fee could be charged in the First Amendment context.

Thus, *Murdock* read *Cox* as permitting only those user fees "nominal" in the sense that the amount of the fee is so low as to have no real likelihood of discouraging speech activity by the class of individuals and groups affected.

As Judge Tjoflat noted in his opinion concurring in part and dissenting in part from the *en banc* Eleventh

Circuit decision, reading *Murdock* as clarifying or modifying *Cox* by limiting user fees to a "nominal" amount is sound in another respect as well. That reading tends to harmonize *Cox* with this Court's later cases recognizing that a fee for engaging in expressive activity is likely to engender content-based discrimination:

> Because of this potential for content-based discrimination, the *Murdock* Court, as a prophylactic rule, requires licensors to impose only nominal fees—even in cases in which the content neutrality of the charges has not been questioned. [934 F.2d 1482, 1491 (1991) (Tjoflat, J., concurring and dissenting).]

Under this approach, the limitation to "nominal" fees for First Amendment access provides much the same prophylactic protection against censorship as the rule against discriminatory taxation of the press adopted in *Minneapolis Star*, *supra*.[15]

[15] Judge Tjoflat went on to posit that a fee can be "nominal" not in an absolute sense, but with regard to both the actual expenditures incurred by the government and the actual resources of the license applicant. This approach to the requirement of a "nominal" fee makes sense as a matter both of diction and of policy, if fees for maintenance of public order are to be allowed at all. The comparison to actual expenditures serves an important prophylactic purpose, while the comparison to available applicant resources assures that there is no actual prior restraint.

The difficulties, for both applicants and government officials, of administering such a context-specific approach calling for a myriad of individual judgments, however, are enormous, given the need for speedy decisionmaking in First Amendment cases. And the very relativity of the standards suggested by Judge Tjoflat's approach imports into the fee setting process a degree of discretion that can facilitate content-based discrimination. These considerations, like those canvassed earlier in this brief, suggest that user fees for First Amendment activity raise sufficient censorship dangers that they should be ruled unconstitutional.

We note as well that we disagree with Judge Tjoflat's opinion insofar as it declines to strike down the statute here on its face.

In sum, even if the aspect of *Cox* permitting imposition of a license fee for First Amendment activity measured to some degree by a locality's costs in maintaining order during the activity remains viable, the ordinance prescribing such a fee should be deemed invalid unless the ordinance: (a) makes clear (or is construed so as to make clear) that the fee can be charged only if the speech activity entails *exclusive* use of a location, and then only with respects to the costs of excluding other competing users; and (b) imposes a fee "nominal" in *either* the absolute sense *or* with respect to both the applicant's resources and the government's actual expenditures. Because the Forsyth County ordinance violates both these requirements, it is facially invalid.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

MARSHA S. BERZON
177 Post Street, Suite 300
San Francisco, CA 94108

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Since the statute does not contain any limitation to "nominal" fees in any sense of the word, and or any proscription upon charges for control of onlookers or counterdemonstrators, it is facially invalid as substantially overbroad. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).